IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1977
No. 77-2116

ROBERT CLIFTON MARLER,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SAN DIEGO

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Petitioner, ROBERT CLIFTON MARLER, prays that a Writ of Certiorari issue to review the judgment of the Appellate Department of the Superior Court of the State of California for the County of San Diego which affirmed without opinion the judgment of the Municipal Court of the San Diego Judicial District convicting petitioner of violating California Penal Code Section 311.2 (sale of obscene matter).

PROCEEDINGS BELOW

No written or oral opinions were rendered in this matter. A misdemeanor complaint was filed on behalf of respondent by the City Attorney of San Diego alleging that petitioner violated Penal Code Section 311.2 on February 24, 1976. On September 1, 1976, petitioner was found guilty by a jury. The judgment of conviction was entered on December 13, 1976 by Judge Carlos A. Cazares of the Municipal Court of the San Diego Judicial District. No opinion was rendered by him.

Petitioner appealed his conviction to the Appellate Department of the Superior Court of the State of California for the County of San Diego, which affirmed the conviction without opinion on May 18, 1977. A copy of the two word Order ("Judgment affirmed") is reprinted in Appendix A to this Petition. Petitioner's petition for rehearing and applications for certification to the California Court of Appeal, Fourth Appellate District, Division One and for publication of opinion were denied on June 14, 1977. A copy of the June 14th Order is reprinted in Appendix B to this Petition.

JURISDICTION

The date of the judgment sought to be reviewed is May 18, 1977. This Court has jurisdiction under 28 U.S.C. §1257(3). The Appellate Department of the Superior Court of the State of California for the County of San Diego is the highest state

court to which a misdemeanor appeal can be taken, California Constitution, Article VI, §11; California Penal Code §1471; California Rules of Court, Rules 62 and 63, unless certification is granted; it was denied herein. See Miller v. California, 413 U.S. 15, 37 L.Ed.2d 419, 93 S.Ct. 2607 (1973); Kuhns v. California, 419 U.S. 1066, 42 L.Ed.2d 662, 95 S.Ct. 651 (1974); Schmerber v. California, 384 U.S. 757, 759 n. 3, 16 L.Ed.2d 908, 86 S.Ct. 1826 (1966).

QUESTIONS PRESENTED

1. Whether issue number 14 of the newsmagazine, Finger is protected by the First and Fourteenth Amendments to the United States Constitution;

2. Whether petitioner's conviction for violating California Penal Code §311.2 is inconsistent with the scienter requirement of Smith v. California, 361 U.S. 147, 4 L.Ed.2d 205, 80 S.Ct. 215 (1959), reh. den. 361 U.S. 950, 4 L.Ed.2d 383, 80 S.Ct. 399 (1960) and Mishkin v. New York, 383 U.S. 502, 16 L.Ed.2d 56, 86 S.Ct. 958, reh. den. 384 U.S. 934, 16 L.Ed.2d 535, 86 S.Ct. 1440 (1966) and therefore violative of the First and Fourteenth Amendments to the United States Constitution;

3. Whether petitioner's conviction for violating California Penal Code §311.2 is unconstitutional under the due process clause of the Fourteenth Amendment because there was no

evidence of scienter, a critical element in an obscenity prosecution. Thompson v. Louisville, 362 U.S. 199, 4 L.Ed.2d 654, 80 S.Ct. 624 (1960);

4. Whether petitioner's due process right to a fair trial and an impartial judge was violated by the judge's statement to the jury that most people disapprove of the type of magazine on trial.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First and Fourteenth Amendments to the United States Constitution and California Penal Code Section 311.2(a).

First Amendment:

"Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Fourth Amendment:

"Section 1 . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection

of the laws. . . ."

California Penal Code Section 311.2(a) provides, in pertinent part, as follows:

> "Every person who knowingly sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state possesses, prepares, publishes, or prints, with intent to distribute or to exhibit to others, or who offers to distribute, distributes, or exhibits to others, any obscene matter is guilty of a misdemeanor."

STATEMENT OF THE CASE

Petitioner is the owner and licensee of a licensee to operate a book store in San Diego, California. He resided in Fullerton, California. San Diego police officer Howard Goldy purchased a news-magazine, "Finger" (issue number 14), from a clerk, Donna Ingalls, at the bookstore on February 24, 1976. The bookstore had a variety of books, magazines, and newspapers available for purchase: e.g., the New York Times, TV Guide, Jaws, All the President's Men, and so-called "adult material" of the kind available in adult bookstores. The bookstore was very large and had numerous books, magazines, and newspapers available.

The store was operated by James Chapman, who managed the premises since January 1976. He had only seen petitioner in the store three or four times between January 1976 and the time of the trial (August 31, 1976). Chapman did not order the materials sold at the store and no other employee did either, to his knowledge.

Officer Goldy, clerk Ingalls, and manager Chapman all testified for the prosecution. Petitioner did not testify and called no witnesses.

During jury selection, the trial judge made the following statement to a prospective juror which was heard by all the prospective jurors:

> ". . . [D]on't feel badly because you happen to disapprove of this type of magazine.
>
> "I think that, by and large, most people do. I don't know most people --"

Petitioner's counsel interrupted the judge at this point and, outside the presence of the prospective jurors, moved for a mistrial and moved for an order discharging all the jurors (those tentatively seated in the box and those in the audience) who heard the statement, but the motions were denied. The prospective jurors who heard the statement eventually became the trial jurors (petitioner did not have enough peremptory challenges to eliminate them). Petitioner accepted the jury under protest.

The jury found petitioner guilty of violating Penal Code Section 311.2(a). The jury was instructed with respect to the word "knowingly" in Penal Code Section 311.2(a):

> "'Knowingly' means being aware of the contents of the matter. It does not mean knowledge that the matter was legally obscene."

In the trial court petitioner argued there was no evidence of "scienter" and that "Finger" was not obscene. The "scienter" argument was made in a pretrial motion to dismiss, in a motion for a directed verdict after the prosecution rested, in argument to the jury, and in a motion for new trial.

Petitioner appealed his conviction to the Appellate Department of the Superior Court, where he made a number of arguments, including the ones set forth in this petition (except he did not specifically argue "Finger, No. 14" was protected by the First and Fourteenth Amendments).

The Appellate Department affirmed without opinion.

REASONS FOR GRANTING THE WRIT

A. The Judgment Below Violates Petitioner's Rights Under the Free Speech Provisions of the First and Fourteenth Amendments and the Due Process Clause of the Fourteenth Amendment

1. Free Speech

a. Issue No. 14 of Finger

The news-magazine which is the basis for the conviction is protected by the First and Fourteenth Amendments to the United States Constitution. This Court has a duty under the Constitution to examine the alleged obscene matter and to make an independent determination as to its "obscenity." See Jenkins v. Georgia, 418 U.S. 153, 41 L.Ed.2d 642, 94 S.Ct. 2750 (1974). While petitioner did not specifically contend in his briefs filed with the Appellate Department that the news-magazine was protected by the constitution, it is clear the Appellate Department, aware of its duty to examine materials in obscenity cases to determine independently whether they are constitutionally protected, considered the news-magazine. It was delivered to the Appellate Department by the municipal court on January 4, 1977 as part of the record on appeal; the Appellate

Department necessarily considered the question when it examined the news-magazine. It necessarily concluded that no free speech interest was infringed when it summarily affirmed the conviction. See Jenkins v. Georgia, supra, 418 U.S. at 157, 41 L. Ed. 2d at 648.

b. Scienter

Petitioner's conviction for sale of an obscene news-magazine, without evidence of scienter, violates the free speech provisions of the First and Fourteenth Amendments. In invalidating an ordinance which imposed absolute criminal liability for the sale of obscene matter without regard for the seller's knowledge, the Court in Smith v. California, 361 U.S. 147, 153, 4 L. Ed. 2d 205,211, 80 S. Ct. 215 (1959), reh. den. 361 U.S. 950, 4 L. Ed. 2d 383, 80 S. Ct. 390 (1960) stated,

> "By dispensing with any requirement of knowledge of the contents of the book on the part of the seller, the ordinance tends to impose a severe limitation on the public's access to constitutionally protected matter. For if the bookseller is criminally liable without knowledge of the contents, and the ordinance fulfills its purpose, he will tend to restrict the books he sells to those he has inspected; and thus the State will have imposed a restriction upon the distribution of constitutionally protected as well as

obscene literature."

2. Due Process

a. Lack of Evidence

Insofar as an element of the crime is "scienter," the conviction violates the due process clause of the Fourteenth Amendment. Thompson v. Louisville, 362 U.S. 199, 4 L. Ed. 2d 654, 80 S. Ct. 624 (1960)(violation of due process to convict without evidence of guilt).

b. Unfair Trial

Petitioner was deprived of a fair trial because the trial judge made a disparaging remark about the news-magazine, "Finger" (No. 14) in the presence of the jury. It is elementary that a trial judge must be fair and impartial. Tumey v. Ohio, 273 U.S. 510, 71 L. Ed. 749, 47 S. Ct. 437 (1927); In re Murchison, 349 U.S. 133, 99 L. Ed. 942, 75 S. Ct. 623 (1955); Mayberry v. Pennsylvania, 400 U.S. 455, 27 L. Ed. 2d 532, 91 S. Ct. 499 (1971). The remark contaminated the jury, which heard it the same day the trial concluded (the presentation of evidence took less than one day) and only one day before the verdict was rendered. If pre-trial publicity can prejudice a jury, see e.g., Estes v. Texas, 381 U.S. 532, 14 L. Ed. 2d 543, 85 S. Ct. 1628, reh. den. 382 U.S. 875, 15 L. Ed. 2d

118, 86 S. Ct. 18 (1965) and cases cited therein, a fortiori a statement maligning the very news-magazine on trial at the commencement of the trial by the trial judge certainly may be considered prejudicial.

The error could have been easily corrected at the time but, unfortunately, the trial judge decided to move ahead. The comment was devastating because it went to the heart of the case, the obscenity of the subject matter.

B. The Judgment Below Raises an Important Constitutional Issue Which Should Be Determined By This Court

---

This Court has never formulated a test to determine the existence of scienter in obscenity cases. In Smith v. California, supra, the landmark scienter case, this Court recognized that proof of scienter was constitutionally required in obscenity cases. However, the Court expressly declined to,"

> "pass . . . on what sort of mental element is requisite to a constitutionally permissible prosecution of a bookseller for carrying an obscene book in stock. . . ."
> 361 U.S. at 154, 4 L. Ed. 2d at 212.

Over eleven years ago, in Mishkin v. New York, 383 U.S. 502, 16 L. Ed. 2d 56, 86 S. Ct. 958, reh. den. 384 U.S. 934, 16 L. Ed. 2d 535, 86 S. Ct.

1440 (1966), this Court last considered proof of scienter in an obscenity case. Justice Brennan, expressing the views of five members of the Court in affirming the conviction, stated,

> "Appellant's principal argument is that there was insufficient proof of scienter. This argument is without merit. The evidence of scienter in this record consists, in part, of appellant's instructions to his artists and writers; his efforts to disguise his role in the enterprise that published and sold the books; the transparency of the character of the material in question, highlighted by the titles, covers, and illustrations; the massive number of obscene books appellant published, hired others to prepare, and possessed for sale: the repetitive quality of the sequences and formats of the books; and the exorbitant prices marked on the books. This evidence amply shows that appellant was 'aware of the character of the material' and that his activity was 'not innocent but calculated purveyance of filth.'"
> 383 U.S. at 511-512, 16 L. Ed. 2d at 63-64.

In contrast, there was no evidence in the instant case establishing petitioner's awareness of the character of the material. Essentially, petitioner was an absentee owner. He was not present on the day of the sale, and there was no evidence that issue number 14 of "Finger" was at the location when petitioner was last there. In

short, there was no evidence petitioner ever saw the news-magazine which formed the basis of the conviction.

Petitioner was convicted simply because he owned the store where the news-magazine was sold. Yet, Smith v. California teaches us that this kind of absolute liability may not be tolerated so long as the First Amendment is a part of our constitution.

Review by this Court is necessary so that the scienter formulation of Smith can be explained. Smith did not develop a test, and Mishkin involved a case where scienter had been established. This Court should grant certiorari in order to develop a test for determining scienter. Otherwise, bookstore owners such as petitioner will be forced to limit the number of books and magazines sold, which is precisely what Smith wanted to avoid. At a minimum, by deciding that the facts of this case do not establish scienter, this Court will have given some guidance in that in the future conduct will be able to be measured against the facts of Mishkin and the facts of the instant case, thereby affording some measure of predictability.

CONCLUSION

For the foregoing reasons, this petition for Writ of Certiorari should be granted.

Respectfully submitted,

ROGER JON DIAMOND

Attorney for Petitioner

APPENDIX A

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
APPELLATE DEPARTMENT
FILED May 18 1977

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. ROBERT CLIFTON MARLER, Defendant and Appellant.	SUPERIOR COURT NO. CR 39457 MUNICIPAL COURT NO. M 203274 (San Diego Judicial District)

O R D E R

Judgment affirmed.

BY THE COURT

/s/ Conyers P. J.

/s/ Focht J.

/s/ Welsh J.

APPENDIX B

FILED
Robert D. Zumwalt, Clerk
JUN 14 1977
By_____
Deputy

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
APPELLATE DEPARTMENT
FILED JUN 14 1977

THE PEOPLE OF THE STATE OF CALIFORNIA,	) SUPERIOR COURT) NO. CR 39457
Plaintiff and Respondent,	) MUNICIPAL COURT
v.	) NO. M 203274) (San Diego Judicial
ROBERT CLIFTON MARLER,	) District)
Defendant and Appellant.	) O R D E R

Petition for rehearing is denied.

Application for certification to the Court of Appeal, Fourth Appellate District, Division One, is denied.

Application for order directing publication of opinion is denied.

BY THE COURT: /s/ Conyers P. J.
/s/ Focht J.
/s/ Welsh J.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-211

ROBERT CLIFTON MARLER,
Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

OPPOSITION OF RESPONDENT TO PETITION FOR WRIT OF CERTIORARI

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PROCEEDINGS BELOW

A misdemeanor complaint was filed on behalf of respondent by the City Attorney of San Diego charging petitioner with a violation of California Penal Code section 311.2(a) on February 24, 1976. A jury returned a verdict of guilty on September 1, 1976. Judgment of conviction was entered on December 13, 1976, by Judge Carlos A. Cazares of the Municipal Court of San Diego Judicial District.

The Appellate Department of the Superior Court of the State of California for the County of San Diego affirmed the jury's verdict.

Petitioner's requests for a rehearing and an application for certification to the California Court of Appeal, Fourth Appellate District, Division One were denied on June 14, 1977.

JURISDICTION

Petitioner invokes the jurisdiction of this Court pursuant to Title 28, United States Code section 1257(3).

QUESTIONS PRESENTED

I. Is petitioner precluded from raising the issue of constitutional protection?

II. Is Issue Number 14 of *Finger* protected by the First and Fourteenth Amendments to the United States Constitution?

III. Is California Penal Code section 311.2(a) consistent with the scienter requirement of *Smith v. California* and *Mishkin v. New York*?

IV. Is petitioner's conviction based on evidence consistent with the scienter requirement of *Smith v. California* and *Mishkin v. New York*?

V. Is petitioner's conviction unconstitutional for lack of evidence of scienter?

VI. Was petitioner denied due process of the law by reason of the judge's comment?

STATEMENT OF THE CASE

On August 30, 1975, petitioner's jury trial commenced. During voir dire examination by petitioner's counsel, the judge made the following comment in response to a juror's reluctance to serve due to her negative feelings about the material in question:

> We have to select a group of a cross section of society. Everybody is entitled to be represented. The People are entitled to a fair trial and so are the defendants, so don't feel badly if you have opinions and express those opinions because we want to make sure you can ignore your personal feelings and your personal experiences and opinions and decide this case solely on the evidence here and the law as stated to you by the Court.
>
> So don't feel badly because you happen to disapprove of this type of magazine.
>
> I think that, by and large, most people do. I don't know. I don't know most people –

The People's evidence was presented through the testimony of San Diego Police Officer Howard Goldly, the defendant's store clerk Donna Ingalls, and the defendant's store manager James Chapman.

The evidence indicated that in 1975, petitioner came to San Diego to open adult bookstores. Petitioner met with Officer Goldy and indicated that he, petitioner, would move to San Diego or come to San Diego on a weekly basis in order to run his business personally. Additionally, petitioner disclosed that he would have the sole financial interest in the business.

After his discussion with Officer Goldy, petitioner applied for and received a city business license. The license identified petitioner as the sole owner and operator of an adult bookstore located at 4281 University Avenue, San Diego.

On February 24, 1976, Officer Goldy went to petitioner's store at the above address. Signs in front of the store read: "World's Largest Book Shop," "Adult Section," "Adult Books," and "Movies." Inside, the store was divided into two sections. The larger portion of the store's interior was designated as the adult section. A sign was posted at the front of this section which stated: "No one under the age of 18 allowed." The magazines in this section were in plain view and displayed on shelves. The covers of many of the magazines were in color and depicted various sexual acts such as oral copulation and intercourse in graphic detail.

Issue No. 14 of *Finger* (hereinafter referred to as *Finger*) was on a shelf in plain view. The magazine contains numerous pictures and drawings depicting males and females in various sexual acts including group sex, defacation, masturbation, urination, urination into the mouth of another, insertion of hands and feet into the anus of another, intercourse with a chicken, bondage, necrophelia, and homosexual acts including oral copulation and anal intercourse. Officer Goldy purchased this magazine from the store clerk.

Mr. James Chapman was the clerk-manager at the store. He saw petitioner in the store at least three or four times during the course of his employment. Chapman's responsibilities at the store did not involve the ordering of any materials for the

store. Chapman also testified that petitioner signed the payroll checks.

The petitioner presented no evidence in his own behalf.

The Judge's instruction to the jury included the following:

> I have not intended by anything that I have said or done, or by any questions that I may have asked, to intimate or suggest what you should find to be the facts on any questions that were submitted to you or that I believed or disbelieved any witness.
>
> If anything I have done or said has seemed to so indicate, you will disregard it and form your own opinion.

On August 31, 1976, the jury returned a verdict of guilty of California Penal Code section 311.2(a).

REASONS WHY THE WRIT OF CERTIORARI SHOULD BE DENIED

There is no merit to petitioner's claim that *Finger* is protected by the First and Fourteenth Amendments to the United States Constitution. The issue of whether *Finger* is obscene was presented to the jury under state statutes and instructions by the court which complied fully with the provisions of the United States Constitution. Further, the Appellate Department of the Superior Court correctly concluded that the comment by the trial judge was not a violation of petitioner's due process rights to a fair trial and an impartial judge.

ARGUMENT

I

PETITIONER IS PRECLUDED FROM RAISING THE ISSUE OF CONSTITUTIONAL PROTECTION.

Only issues which properly arise in the record and which have been urged and briefed below may be presented by petitioner for review, *California v. Taylor,* 353 U.S. 553, 557 n. 2, 1 L.Ed.2d 1034, 1037 n. 2, 77 S.Ct. 1037, 1039 n. 2 (1957), unless there are exceptional circumstances. *Lawn v. United States,* 355 U.S. 339, 363 n. 16, 2 L.Ed.2d 321, 337 n. 16, 78 S.Ct. 311, 324 n. 16, *rehg. denied,* 355 U.S. 967, 2 L.Ed.2d 542, 78 S.Ct. 529 (1958).

In the instant case, petitioner did not raise the question of whether *Finger* is protected by the First and Fourteenth Amendments to the United States Constitution (see p. 7 of Petitioner's Brief), nor does he state in his brief any exceptional circumstances which entitle him to raise this issue now. Accordingly, petitioner's request for an independent review by this Court should be denied.

II

FINGER IS UNPROTECTED BY THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

If this court grants petitioner's request for an independent review, it is clear that *Finger* is unprotected by the First and Fourteenth amendments to the United States Constitution.

These amendments have never been treated as absolutes, and this court has held that obscene material is unprotected by the First Amendment. *Miller v. California,* 413 U.S. 15, 37 L.Ed.2d 419, 93 S.Ct. 2607 (1973); *Roth v. United States,* 354 U.S. 476, 1 L.Ed.2d 1498, 77 S.Ct. 1304 (1957).

In determining whether or not a matter is obscene, a jury does not have unbridled discretion. This Court may independently test the material for the existence of each of the three obscenity elements (prurient-appeal, patent-offensiveness, and social value) because these elements are questions of constitutional fact. *Jenkins v. Georgia,* 418 U.S. 153, 41 L.Ed.2d 642, 94 S.Ct. 2750 (1974); *Kois v. Wisconsin,* 408 U.S. 229, 33 L.Ed.2d 312, 92 S.Ct. 2245 (1972). Such a test will find that each element is indeed present.

Prurient Appeal

The dominant theme of *Finger* taken as a whole is explicitly aimed at a shameful, or morbid interest in nudity, sex, or excretion. It containes numerous pictures and drawings depicting males and females in various sexual acts including group sex, defaction, masturbation, urination, urination into the mouth of another, insertion of hands and feet into the anus of another, intercourse with a chicken, bondage, necrophilia, and homosexual acts such as oral copulation and anal intercourse.

Additionally, the text which has been inserted with these photographs and drawings is an unsuccessful attempt to dignify what is clearly intended to be sold as hard core pornography. The text is a sham attempt to cloak commercial pornography in the guise of legitimacy. As such, the theme of pruriency remains dominant throughout the magazine.

Patent-Offensiveness

This Court has held that no one will be subject to prosectuion for the sale of obscene materials unless these materials depict or describe patently offensive hardcore sexual conduct. *Jenkins v. Georgia, supra.* Furthermore, this Court has provided examples of what is patently offensive hardcore sexual conduct: representations or descriptions of (1) ultimate sexual acts, normal or perverted, actual or simulated; (2) masturbation; (3) excretory functions; and (4) lewd exhibition of the genitals. *Miller v. California, supra.*

Finger is patently offensive because it contains representations and descriptions of these same hardcore sexual acts.

Social Value

The First Amendment is designed, *inter alia,* to protect minority or unpopular views, tastes, opinions, ideas or desires; particularly in the area of literature, art, politics, and science. *Miller v. California, supra.*

Petitioner does not claim now nor did he offer any evidence at trial to show that *Finger* has any social value. Both the written and pictorial representations are not intended to convey literary, artistic, political or scientific ideas or messages, but rather to "dress up" material which is sold and distributed for its obscenity.

Each element of obscenity is present in *Finger.* Accordingly, *Finger* is unprotected by the First and Fourteenth Amendments to the United States Constitution.

III

CALIFORNIA PENAL CODE SECTION 311.2(a) IS CONSISTENT WITH THE SCIENTER REQUIREMENT OF *SMITH V. CALIFORNIA* AND *MISHKIN V. NEW YORK.*

Without evidence of scienter, a book seller may not be held criminally liable for the sale of obscene matter. To hold otherwise would restrict the distribution of both constitutionally protected literature as well as obscene literature. *Smith v. California,* 361 U.S. 147, 4 L.Ed. 205, 80 S.Ct. 215 (1959), *rehg. denied,* 361 U.S. 950, 4 L.Ed.2d 383, 80 S.Ct. 399 (1960); *Mishkin v. New York,* 383 U.S. 502, 16 L.Ed.2d 56, 86 S.Ct. 958, *rehg. denied,* 384 U.S. 934, 16 L.Ed.2d 535, 86 S.Ct. 1440 (1966). A book seller, however, may be well aware of the nature of a book he sells and its appeal without opening its cover, or in a true sense having knowledge of the book (concurring opinion of Justice Felix Frankfurter in *Smith v. California, supra*).

California Penal Code section 311.2(a) embodies the foregoing precept by making scienter, *i.e.,* knowledge, a required element of every obscenity case. The term "knowingly" is defined in California Penal Code section 311(e): " 'Knowingly' means being aware of the character of the matter or live conduct." This definition is consistent with *Mishkin* which held that to establish scienter, the evidence must show that the defendant was aware of the character of the material.

On page seven of his brief, petitioner cites the instruction given to the jury on the word "knowingly": " 'Knowingly' means being aware of the *contents* of the matter. It does not

mean knowledge that the matter was legally obscene." Substitution of the word "contents" for the word "character" creates no inconsistency. If anything, this change created a heavier burden for the prosecution in proving scienter. Moreover, petitioner did not raise this instruction as error below and is precluded from doing so now. *California v. Taylor, supra.*

IV

PETITIONER'S CONVICTION WAS BASED ON EVIDENCE CONSISTENT WITH THE SCIENTER REQUIREMENT OF *SMITH V. CALIFORNIA* AND *MISHKIN V. NEW YORK.*

The evidence to support a finding of scienter in obscenity cases may be either direct or circumstantial. *Mishkin v. New York, supra.* The required degree of circumstantial evidence will depend on the facts of each obscenity case. Accordingly, petitioner's request that this court compile a exhaustive catalogue of such circumstances or formulate a uniform test in determining scienter is unrealistic, if not impossible.

Furthermore, the California obscenity cases which have decided the question of sufficient circumstantial evidence of scienter on the part of a bookstore owner are consistent with the requirements of *Smith* and *Mishkin.*

In *People v. Andrews,* 23 Cal.App.3d Supp. 1, 100 Cal.Rptr. 276 (1972), as in *Smith,* ownership alone was held to be insufficient circumstantial evidence of scienter on the part of a bookstore owner. In *People v. Pinkus,* 256 Cal.App.2d Supp. 941, 63 Cal.Rptr. 680 (1967); *People v. Kuhns,* 61 Cal.App.3d

735, 132 Cal.Rptr. 725 91976), as in *Mishkin,* a bookstore owner's scienter was established by ownership plus various circumstantial evidence, *e.g.* payments by the owner of bills and payroll, signs on the premises indicating the character of the material for sale, pictures on the covers of magazines inside the store, displays of the material in plain view, and visits to the bookstore by the owner.

While the circumstantial evidence establishing scienter necessarily varies from case to case, the requirement of scienter remains constant: Does the evidence amply show that the defendant was aware of the character of the material and that his activity was not innocent but calculated purveyance of filth? *Mishkin, supra,* at 511-512. In light of this requirement, and the California cases noted above, petitioner's conviction is consistent with the scienter requirement of *Smith v. California, supra*; *Mishkin v. New York, supra.*

V

PETITIONER'S CONVICTION IS NOT UNCONSTITUTIONAL FOR LACK OF EVIDENCE OF SCIENTER.

Evidence of scienter does not have to establish a defendant's knowledge of the actual contents of the alleged obscene matter, but rather his awareness of the character of the material. *Hamling v. United States,* 418 U.S. 87, 41 L.Ed.2d 590, 94 S.Ct. 2887 (1974).

In the instant case, petitioner's awareness of the character of *Finger* was established, *inter alia,* by the following

circumstantial evidence: (1) petitioner applied for and was granted a business license as owner and *operator* of the adult bookstore; (2) he indicated that he would have the sole financial interest in the business; (3) he indicated his intent to run the business himself, and on the date of the offense his business included the bookstore where *Finger* was sold; (4) he personally hired an employee to manage the store; (5) he personally signed the payroll checks to both the manager and the clerk of the bookstore; (6) none of the employees of the store ordered any of the materials for sale; (7) signs outside the store advertised "Adult Material," and a sign inside the store stated "No One Under 18"; (8) *Finger* as well as other magazines depicting explicit sexual acts, were in plain view on the shelves in the bookstore; and (9) he had met personally with the bookstore manager at the bookstore at least three or four times.

The foregoing evidence established petitioner's awareness of the character of *Finger* as well as his calculated rather than innocent purveyance of it. The jury did not permit petitioner to hide behind the guise of absentee ownership. Accordingly, petitioner's conviction did not violate the due process clause of the Fourteenth Amendment.

VI

PETITIONER WAS NOT DENIED DUE PROCESS OF THE LAW BY REASON OF THE JUDGE'S COMMENT.

The California Constitution expressly permits the court to ". . . make such comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary for

the proper determination of the case." California Constitution Article VI, Section 10. This judicial right of comment has received statutory enactment in California Penal Code sections 1093 and 1127.

The judicial power to comment on the evidence, however, is not arbitrary and has inherent limitations. A judge may not withdraw material from the jury's consideration or distort the testimony of witnesses. Similarly, a judge's comments should be temperately and fairly made and should not assume the complexion of partisan advocacy. *People v. Flores,* 17 Cal.App.3d 579, 587, 95 Cal.Rptr. 138, 143 (1971).

As long as a judge's comments do not usurp the exclusive provence of the jury to decide the facts and the credibility of witnesses, the comments are within the bounds of propriety. *People v. Friend,* 50 Cal.2d 570, 577, 327 P.2d 97, 101 (1958). Beyond these obvious limitations, "No hard and fast rule determinative of what a trial judge may or may not say to a jury in commenting on the evidence and the credibility of witnesses can be laid down." *People v. Ottey,* 5 Cal.2d 714, 724, 56 P.2d 193, 197 (1936); *People v. Flores, supra,* 95 Cal.Rptr. 138, 141 (1971).

It is impossible to generalize as to what particular comments should or should not be permitted in all criminal cases. Each case must necessarily turn upon the context and extent of the comments and the peculiar circumstances under which comments are made. *People v. Ottey, supra.* Nevertheless, within the bounds of propriety, the court may exercise its own discretion with respect to what comments it will make. The trial court is the best judge of the extent of the comments and should be free to exercise its discretion in accordance with its own judgment. *People v. Ottey, supra.*

In the instant case, the judge's comment was intended to reassure the jury and to foster open and honest answers to the voir dire questions. The court made numerous statements to the prospective jury panel members in an attempt to put them at ease and enable them to effectively answer questions of a delicate and sensitive nature. In essence, the judge instructed the jurors not to feel badly regarding their personal opinions and to express any such feelings. The court asked the jurors to express any disapproval of this type of magazine so that the extent of and basis for the disapproval could be examined by both counsel. The court's statement did not express the opinion that the magazine was obscene, nor that petitioner had knowledge of its character; nor was the comment directed at any evidence or element of the case. The statement was not directive in nature nor was it part of the charge to the jury.

Furthermore, any possible prejudice was cured by the instruction given to the jury to disregard all statements made by the court during the trial. (Reporter's Transcript, 332.) Accordingly, petitioner was not denied due process of law by reason of the judge's comment during voir dire.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for Writ of Certiorari should be denied.

Dated: November 2, 1977

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